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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 472

REMO J. ADDABBO, individually, etc. and others, etc.,

Petitioners,

v.

JAMES B. DONOVAN and others, constituting the Board of Education of the City of New York, and others, etc.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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212 RE 2-1238

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Petitioners herein respectfully pray that a Writ of Certiorari issue to review an order of the Court of Appeals of the State of New York, entered July 29th, 1965.

Opinions Below

The Court of Appeals of the State of New York (reported at 16 N. Y. 2d 619) affirmed the order of the Appellate Division, Second Department. The judgment of the New York Court of Appeals was entered on July 29th, 1965 and is reprinted as Appendix B. Decision was rendered May 27, 1965 by the New York Court of Appeals.

The respective opinions of the Appellate Division, Second Department (reported at 22 A.D. 2d 383, 256 N. Y. S. 2d 178) and of Special Term, Queens County (reported at 43 Misc. 2d 621, 251 N. Y. S. 2d 856) appear in the certified record.

Jurisdiction

The Jurisdiction of this Court is invoked under 28 U. S. C. Section 1257(3), since the City and State of New York have deprived petitioners of the rights, privileges and immunities provided by U. S. Constitution, Amendment XIV and 42 U. S. Code, Sections 2000c, et seq.

Question Presented

Are the petitioners deprived of equal protection of the laws, or of liberty without due process of law by a plan of the respondents, which:

excludes their children from their neighborhood schools which they would otherwise attend,

and requires them to transfer to a more distant school,

and requires them to travel past their nearest school which they previously attended,

by reason of the racial composition of their neighborhood?

Statutes Involved

U. S. Constitution, Amendment XIV.

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

42 U. S. Code Section 2000c (Civil Rights Act of 1964, Section 401)

> "As used in this title (b) 'Desegregation' means the assignment of students to public schools and within such schools without regard to their race, color, religion, or national origin, but 'desegregation' shall not mean the assignment of students to public schools in order to overcome racial imbalance."

Statement

Public School No. 149 is located in the community known as Jackson Heights, New York. This part of the community is comprised mostly of white inhabitants. The school, at one time, had as its students all White pupils. The neighborhood changed, and, as of September, 1964, had approximately 87% White students, and 13% Negro and Puerto Rican students.

Public School No. 92 is located in the community known as Corona, New York. This part of the community is comprised mostly of Negro inhabitants. At one time the student body was rather mixed, but due to shifting populations as of September, 1964, the school had 97% Negro children attending it.

The respondents made an administrative determination to "balance" the races between these schools. As a subterfuge, scheme and device, they introduced certain alleged additional educational facilities to cloak the admitted real reason for the determination.

The Special Term, Queens County, had found that "it is clear that a very important, probably the most important factor in the respondents' determination was the reduction of racial imbalance". There is no question but that race was the most important consideration for the determination. Prior to the determination, children at-

tended their schools without regard to race considerations of any degree.

The respondents' determination requires children of tender years to walk past their nearest school, cross heavily trafficked thoroughfares, sustain inconvenience, hardship and deprivation of freedom of choice, and be deprived of constitutional guarantees.

No hearing on the matter was ever held before the Commissioner of Education of the State of New York.

The respondents had, at one time, suggested some 42 schools to be involved in their "balancing" program, but reduced this to 8 schools.

Reasons for Granting the Writ

One of the most crucial, if not the most crucial, of the problems facing this nation today is the preservation of the rights of all persons, without regard to race, color, religion or ethnic origin. An American must be free to proceed through life, and attain the fruits of our society unencumbered by his color or race. He must not be accorded a particular beneficial or detrimental treatment before the law.

Here, the respondents have up-rooted children, both Negro and White, based on their color, because the respondents attempt to accord beneficial treatment to a race. The respondents directive destroys the value of a neighborhood school. The respondents apparently are not satisfied by the racial composition of the neighborhood feeding the schools. The respondents desire to 'balance' the races, that is, White and Negro race. Nothing in the determination refers to Orientals or Indians.

The petitioners children are subjected to the hazards of being transferred from their existing neighborhood school to a more distant one because they are White.

I.

Pupil assignments founded upon racial considerations are repugnant to the requirements of equal protection and due process.

This Court has held that assignments of public school pupils, solely on the basis of their race, amounts to a deprivation of equal protection of the laws. *Brown* v. *Board of Education,* 347 U. S. 438, 74 S. Ct. 686, 98 L. Ed. 583 (1954).

Similarly, this Court has held that pupil assignment predicated upon racial considerations constitutes an unconstitutional deprivation of due process of law. *Bolling* v. *Sharpe,* 347 U. S. 497, 74 S. Ct. 693, 98 L. Ed. 591 (1954):

("Classifications based solely upon race must be scrutinized with particular care, since they are contrary to our traditions and hence constitutionally suspect.")

See also, *Goss* v. *Board of Education of Knoxville,* 373 U. S. 683 at 686, 83 S. Ct. 405, 10 L. Ed. 2d 632 (1963).

("We note that if the transfer provisions were made available to all students regardless of their race and regardless of the racial composition of the school to which they requested transfer, we would have an entirely different case. Pupils could then at their option (or that of their parents) choose entirely free of any imposed racial considerations to remain in the school of their zone, or to transfer to another.

"Classifications based on race for purposes of transfer between public schools, as here, violate the Equal Protection clause of the Fourteenth Amendment. As the Court said in an earlier case * * * (racial classifications are obviously irrelevant and invidious).

II.

Conflicting State and Federal decisions on the question of desired racial quotas makes a resolution of the present case of vital importance.

American life today is rife with conflicting contentions, by majority—and minority—groups, to the effect that restrictions should be imposed upon the one, or that special privileges should be accorded to the other, on the basis of racial or ethnic considerations.

It is essential in cases of this area of our national life that the state adhere strictly to the principles of objective constitutional neutrality.

To subject our Constitution on the one hand to the demands of segregationists, who seek a compulsory separation of the races; or, on the other hand, to the demands of those who seek an across-the-board system of racial quotas, is in each instance to surrender the rule of objective laws to that of subjective men.

This Court, and some lower courts, have consistently recognized that the concept of compulsory racial quotas is repugnant to the overriding interest of constitutional neutrality.

Hughes v. *California,* 339 U. S. 460, 94 L. Ed. 985, 70 S. Ct. (1950) (petitioners held not entitled to picket, to secure compliance with demand that store employees be in proportion to the racial origin of its customers).

Downs v. *Kansas City Board of Education,* 336 F. 2d 988 (10th Cir. 1964), cert. den. 380 U. S. 914, 85 S. Ct. 898, 13 L. Ed. 2d 800 (1965).

See also *Collins* v. *Walker,* 329 F. 2d 100, 105 (5th Cir. 1964), cert. den. 379 U. S. 901, 85 S. Ct. 189 (1964) (de-

liberate inclusion of Negroes in a grand jury held as much a deprivation of equal protection as their deliberate exclusion).

Swain v. *Alabama*, 380 U. S. 202, 85 S. Ct. , 13 L. Ed. 2d 759 (1965) (defendant, convicted of felony, held not entitled of right to a racially balanced jury).

Wright v. *Rockefeller*, 376 U. S. 52, 84 S. Ct. 603, 11 L. Ed. 2d 512, reh. den. 376 U. S. 959, 84 S. Ct. 964 (1964) (petitioners held not entitled to a racially balanced Congressional election district).

However, the Federal Courts of Appeals, as well as State Courts of last resort, have been unable to agree even upon the basic concepts which should apply in this area of legal controversy. Consequently, the law is unsettled, and should be reconciled.

Bell v. *School City of Gary, Indiana*, 213 F. Supp. 819, aff'd 324 F. 2d 209 (7th Cir. 1963), cert. den. 84 S. Ct. 1223, 377 U. S. 924, 12 L. Ed. 2d 216 (1964) (petitioners held not entitled of right to racially "balanced" public schools).

Jackson v. *Pasadena*, 31 Cal. Rept. 606, 382 P. 2d 878 (1963) (petitioners held entitled to racially balanced schools).

Taylor v. *Board of Education of New Rochelle*, 191 F. Supp. 181, aff'd 294 F. 2d 36 (2d Cir. 1961) cert. den. 368 U. S. 940, 82 S. Ct. 382, 7 L. Ed. 2d 339 (1961) (racial "imbalance" in public schools held a deprivation of equal protection).

Rippy v. *Borders*, 250 F. 2d 690 (5th Cir. 1957) (petitioners held not entitled to racially "balanced" schools).

III.

The fact that the Respondents are authorized by law to administer the schools does not dispose of their unconstitutional conduct.

The Court of Appeals relied upon *Matter of Vetere,* 15 N. Y. 2d 259 in the instant case. In the latter matter, the majority of the Court held that it could not interfere with an administrative determination which the Education Commissioner has power to make.

Matter of Vetere, supra, is now before this Court under Docket No. 246, 1965.

However, this Court has made clear the rule that administrative actions of school officials, even if otherwise proper, are nevertheless unconstitutional if founded upon racial considerations.

Griffin v. *County School Board of Prince Edward County,* 377 U. S. 218, 12 L. Ed. 2d 256, 84 S. Ct. 1226 (1964) ("Whatever nonracial grounds might support a state's allowing a county to abandon public schools, the object must be a constitutional one, and grounds of race * * *do not qualify as constitutional").

It is for the Court, and not the Administrative agency to determine what action is within or without the law.

Barry v. *O'Connell,* 303 N. Y. 46.

The violation by the respondents, of their own criteria, has further deprived the petitioners of their constitutional rights.

No other similar case, with the exception of *Matter of Vetere* (U. S. Supreme Court Docket No. 246—1965), has reached the U. S. Supreme Court for decision. Involved

here is a "pairing plan" for racial placement. The factual situation in *Matter of Balaban v. Rubin* (14 N. Y. 2d 193, cert. denied 379 U. S. 881) is not applicable to the case at bar.

Here, constitutional rights are deeply involved. This Court should review the order below.

CONCLUSION

This petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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212 RE 2-1238

APPENDIX A

Decision of the Court Below

In the matter of Remo J. Addabbo, individually and as parent and natural guardian of Raymond Addabbo, etc., and others,

Petitioners,

v.

James B. Donovan, etc, and others, constituting the Board of Education of the City of New York, etc., and others,

Respondents.

Order affirmed, without costs. (See *Matter of Balaban* v. *Rubin,* 14 N. Y. 2d 193, cert. den. 379 U. S. 881; *Matter of Vetere* v. *Allen,* 15 N. Y. 2d 259; *Matter of Van Blerkom* v. *Donovan,* 15 N. Y. 2d 399). No opinion. All concur.

APPENDIX B

Judgment of the Court Below

At a Special Term, Part II of the Supreme Court of the State of New York, held in the County of Queens, at the General Courthouse, 88-11 Sutphin Boulevard, Jamaica, New York, on the 29th day of July, 1965.

Present—Hon. LESTER HOLTZMAN, Justice

IN THE MATTER OF

The Application of REMO J. ADDABBO, individually and as the parent and natural guardian of RAYMOND ADDABBO, an infant; PETER J. BALIDES, individually and as the parent and natural guardian of RICHARD GEORGE BALIDES, an infant; ALBERT BLUMSTEIN, individually and as the parent and natural guardian of LISA SHARI BLUMSTEIN, an infant; WALTER YACIUK, individually and as the parent and natural guardian of WALTER YACIUK, an infant; BERNARD FISTEN, individually and as the parent and natural guardian of MICHAEL RAY FISTEN, an infant; JEROME KAHN, individually and as the parent and natural guardian of MARTIN DAVID KAHN, an infant; ARTHUR KAUFMAN, individually and as the parent and natural guardian of CYNTHIA LYNN KAUFMAN, an infant; ABE PARKER, individually and as the parent and natural guardian of SHERYL PARKER, an infant; ALBERT TUREK, individually and as the parent and natural guardian of ELLEN SUSAN TUREK, an infant; SEYMOUR WASSERMAN, individually and as the parent and natural guardian of BARRY STEVEN WASSERMAN, an infant; and HAROLD ZAP, individually and as the parent and natural guardian of EDWARD MARK ZAP, an infant, and on behalf of other children similarly situated, and as residents and taxpayers of of the County of Queens in the area of Jackson Heights, serviced by Public School #149, Jackson Heights, Queens County, City and State of New York,

Petitioners,

for an order under Article 78 of the Civil Practice Law and Rules, to review the determinations, orders and plans of the Board of Education,

against

JAMES B. DONOVAN, LLOYD K. GARRISON, JOSEPH G. BARKAN, AARON BROWN, MORRIS IUSHEWITZ, MARY CONWAY KOHLER, CLARENCE SENIOR, ROSE SHAPIRO, AND ALFRED A. GIARDANO, constituting the Board of Education of the City of New York; CALVIN E. GROSS, Superintendent of Schools, City of New York; and BERNARD E. DONOVAN, Executive Deputy Superintendent of Schools, City of New York.

Respondents.

A petition and supplemental petition having been filed by the above named petitioners as parents and natural guardians of the respective above named infants, for an order under Article 78 of the Civil Practice Law and Rules, to review and set aside the determination of the respondents to take certain action in relation to the assignment of pupils to schools within a newly established community zone, and said petition and supplemental petition having duly come on to be heard at a Special Term of the Supreme Court, Queens County, and after due deliberation said Court having rendered its decision dismissing the petition and the Supplemental petition, and an appeal having been taken by the petitioners from the judgment of the Supreme Court aforesaid to the Appellate Division, Second Department, and said appeal having duly come on to be argued before the said Appellate Division of the Supreme Court and that Court having affirmed the decision of the Supreme Court, Queens County, and petitioners herein having appealed to the Court of Appeals from the judgment of the Appellate Division, Second Department, and said appeal having come on to be heard before the

Court of Appeals, and after argument by Bernard Kessler, Esq., for the petitioners, and by Sidney P. Nadel, Esq., of Counsel for the respondents, and due deliberation having been had thereon, and said Court having rendered its decision that the judgment of the Appellate Division of the Supreme Court, Second Department do be affirmed without costs, and having further ordered that the records and the proceedings in the Court of Appeals be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

Now, on motion of Bernard Kessler, Esq., attorney for the petitioners,

IT IS ORDERED, that the order of the Court of Appeals in the above entitled matter which affirmed the judgment of the Appellate Division, Second Department herein which said order of the Appellate Division, Second Department affirmed the judgment of the Supreme Court, Queens County, be and the same hereby is made the order of this Court, and it is further,

ORDERED, that respondents have judgment dismissing the petition and supplemental petition herein.

ENTER

LESTER HOLTZMAN

.....

Justice of the Supreme Court

Filed: 7/30/65

GRANTED
July 29, 1965

PAUL LIVOTI
Clerk